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No.

In The Supreme Court of the United States

OCTOBER TERM, 1983

ALPHA OTIS O'DANIEL STEPHENS,
Petitioner,

v.

RALPH KEMP, Superintendent,
Georgia Diagnostic & Classification Center,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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85 pp

QUESTIONS PRESENTED

1. Did the Eleventh Circuit ignore this Court's holdings in *Price* v. *Johnston*, 334 U.S. 266 (1948), and *Sanders* v. *United States*, 373 U.S. 1 (1963), by denying petitioner an evidentiary hearing on abuse of the writ of habeas corpus?

2. Under what circumstances can constitutional issues be raised in a successor petition when their omission from a prior petition is explained by (i) ineffectiveness of prior habeas counsel; (ii) recently developed evidence; (iii) intervening changes in the law; or (iv) prior nonexhaustion of state remedies?

3. Must a habeas petitioner proffer affidavits or testimony of prior counsel admitting ineffectiveness as a precondition to an evidentiary hearing on his sixth amendment claim?

4. Did the Eleventh Circuit err (a) in refusing to allow petitioner to submit statistical evidence to establish a prima facie case of race discrimination in violation of the fourteenth amendment equal protection clause, and (b) in requiring petitioner to demonstrate intentional racial discrimination in order to sustain his claim that the arbitrary and discriminatory application of the Georgia death penalty statute violates the eighth amendment?

5. Did the Eleventh Circuit err in holding that *Enmund* v. *Florida*, 458 U.S. 782 (1982), did not require that the trial court instruct the jury that petitioner could not be sentenced to death if they credited his testimony, given when he testified for the first time during the penalty phase, that he did not kill, attempt to kill, or intend to kill?

THE PARTIES

The parties before this Court are set forth in the caption.

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IN THE

Supreme Court of the United States

October Term, 1983

No.

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner,

v.

RALPH KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Alpha Otis O'Daniel Stephens respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 9, 1983.

OPINIONS BELOW

The opinion of the panel of the court of appeals is reported at 721 F.2d 1300 (11th Cir. 1983), and is annexed hereto as Appendix A. The order and dissenting opinions of the en banc court of appeals denying a motion for a rehearing and a suggestion for a rehearing en banc is reported at 722 F.2d 627 (11th Cir. 1983) and is annexed hereto as Appendix B. The district court's opinion is reported at 578 F. Supp. 103 (N.D. Ga. 1983) and is annexed hereto as Appendix C.

JURISDICTION

The opinion and order of the court of appeals was entered on December 9, 1983. A timely petition for rehearing and a suggestion for rehearing en banc was denied on December 13, 1983. Within 90 days of this denial, petitioner received an extension of time in which to file this petition from Justice Powell to and including April 11, 1984. Justice Powell granted an additional extension to and including May 11, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1), 1651 and 2253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V of the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII of the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1 of the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 6 of the Rules Governing Section 2254 Cases in the United States District Court, 28 U.S.C. foll. § 2254, provides that:

> (a) *Leave of court required.* A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).
>
> (b) *Requests for discovery.* Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.
>
> (c) *Expenses.* If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

Rule 9(b) of the Rules Governing Section 2254 Cases in the District Court, 28 U.S.C. foll. § 2254, provides that:

> *Successive Petitions.* A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

1. *Stephens' Trial and First State and Federal Habeas Petitions*

The trial of Alpha Otis O'Daniel Stephens began on January 20, 1975. Only one day later he was convicted and sentenced to die.* The Supreme Court of Georgia subsequently affirmed Stephens' conviction and sentence. *Stephens* v. *State*, 237 Ga. 259, 227 S.E.2d. 261, *cert. denied*, 429 U.S. 986 (1976).

On April 14, 1977, Stephens' trial counsel filed a petition for writ of habeas corpus in the Georgia state courts, presenting none of the claims raised in this successor petition. The state court denied relief. *Stephens* v. *Hopper*, No. 77-94 (Dec. 14, 1977), *aff'd*, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978).

On February 8, 1979, Stephens' trial counsel filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied relief.** *Stephens* v. *Zant*, 79-30-MAC (M.D. Ga.

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* The facts material to a decision on this petition have also been set forth at length in Petitioner's Application for a Stay of Execution, dated December 12, 1984, and in Appendices A and B to Petitioner's Memorandum in Opposition to Respondent's Application for Reconsideration and Vacation of This Court's Order Staying Stephens' Execution, dated February 7, 1984, all of which have been previously filed with this Court.

** Stephens was represented at trial by two attorneys one withdrew after trial, and one continued to represent Stephens until his first federal habeas petition was denied. One other attorney, James Bonner of the Prisoner Legal Counseling Project, played a limited role in Stephens' first petition. Working for a small, overburdened organization which was under increasing pressure from its financial supporters not to represent death-sentenced prisoners, *see Thomas* v. *Zant*, 697 F.2d 977, 988 n.14 (11th Cir. 1983), Bonner acted as a consultant to Stephens' first habeas counsel on only one issue, and did no work either to support the merits of the remainder of Stephens' first petition or to identify otherwise unasserted issues.

May 11, 1979). After the United States Court of Appeals for the Fifth Circuit reversed the district court's denial of habeas corpus relief, *Stephens* v. *Zant*, 631 F.2d 397, 407 (5th Cir. 1980), *modified on reh'g*, 648 F.2d 446 (5th Cir. 1981), this Court granted certiorari, 454 U.S. 814 (1981), reversed the Fifth Circuit and reinstated the death sentence. *Zant* v. *Stephens*, U.S. , 103 S. Ct. 2733 (1983).

2. *The Second State Habeas Petition*

After remand, Stephens retained current counsel. On November 7, 1983, Stephens filed his successor verified petition for writ of habeas corpus in the Georgia state courts. On this same date, counsel was notified that an execution date had been set for November 16, 1983. On November 10, 1983, after a short oral argument, the superior court dismissed the writ and denied the motion for a stay. The court ruled, as a "threshold matter", that Stephens was not entitled to a hearing on the merits of his claims. The Supreme Court of Georgia, on November 14, 1983, affirmed the dismissal of the petition but issued a stay for ten days to give Stephens time to resort to the federal courts, effectively vacating the execution order.

On appeal to the Fifth Circuit, the NAACP Legal Defense and Education Fund ("LDF") intervened as amicus curiae. The LDF pursued the issues raised in Stephens' petition, and further raised several additional issues which are included in Stephens' present petition. The Fifth Circuit, however, refused to consider the issues raised by amicus on appeal which had not been presented to the district court.

3. *The Instant Habeas Petition*

With no execution date outstanding, Stephens filed this successor verified petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia, Macon Divison, on November 14, 1983. Simultaneously, pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, Stephens filed a motion for a stay of execution, for leave to take discovery, for funds to retain experts and for an evidentiary hearing. That same day, the district court ordered oral argument on Stephens' stay application to be held the following day in Savannah in a courthouse of the United States District Court for the Southern District of Georgia.

On November 21, 1983, the district court summarily dismissed Stephens' petition as an abuse of the writ, denied his application for a stay of execution, for discovery and for funds to retain experts. *Stephens* v. *Kemp*, 578 F. Supp. 103, 108 (M.D. Ga. 1983). The district court specifically refused to provide an evidentiary hearing. *Id.*

Stephens' application for a certificate of probable cause to appeal was denied by the district court on November 29, 1983. On December 1, Stephens filed with the Eleventh Circuit an emergency application for a certificate of probable cause and for a stay of execution. On the same date, Stephens received notice that the trial court had set an execution date of December 14, 1983. The Eleventh Circuit heard oral argument on December 7 and, on December 9, denied both of Stephens' applications. *Stephens* v. *Kemp*, 721 F.2d 1300 (11th Cir. 1983).

Stephens filed a petition for rehearing and a suggestion for rehearing en banc on December 10, which was denied on December 13 in a 6-6 vote. *Stephens* v. *Kemp*, 722 F.2d 627 (11th Cir. 1983). Judge Kravitch, who had joined in the panel decision, filed a separate opinion in support of the dissenters. *Id.* at 629.

The Eleventh Circuit's even split left intact the decision of the district court, made without an evidentiary hearing, that Stephens should be allowed to die on December 14, 1983. Other than the emergency stay application, the 6-6 decision by the circuit court was the last judicial consideration of the issues in this case.

Stephens filed an emergency application for a stay of execution with Justice Powell, which was referred by him to the entire Court and granted late in the evening of December 13. The Court issued an order staying Stephens' execution "pending the decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer* v. *Zant*, . . . or until further order of this Court." *Stephens* v. *Kemp*, 104 S. Ct. 562 (1983). On February 21, 1984, this Court denied respondent's motion to vacate the stay of execution. *Stephens* v. *Kemp*, 52 U.S.L.W. 3610 (U.S. Feb. 21, 1984).

REASONS FOR GRANTING THE WRIT

Introduction

Stephens requests that this Court grant certiorari to determine whether the district court decision, without an evidentiary hearing, to dismiss the writ as abusive conflicts with the decisions of this Court. Such a determination is especially appropriate since, absent relief from this Court, Stephens will be executed on the basis of a 6-6 affirmance, by default, of a district court decision made without giving Stephens a full and fair opportunity to present his evidence.

POINT I

STEPHENS WAS DENIED HIS RIGHT UNDER *PRICE* v. *JOHNSTON*, 334 U.S. 226 (1948), AND *SANDERS* v. *UNITED STATES*, 373 U.S. 1 (1963), TO AN EVIDENTIARY HEARING ON ABUSE OF THE WRIT

Both the district and circuit courts have found that several of Stephens' claims would have required a hearing on the merits, if they had not been brought in a successor petition. *See* Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254. Before Stephens' meritorious claims are foreclosed on this procedural ground, minimum requirements of due process and fundamental fairness mandate that he first be given an evidentiary hearing to prove that his petition is not abusive. *See Johnson* v. *Copinger*, 420 F.2d 395, 399 (4th Cir. 1969).

This Court has held that "if there is a substantial conflict [concerning whether petitioner's successor petition is an abuse of the writ] a hearing may be necessary to determine the actual facts." *Price* v. *Johnston*, 334 U.S. 266, 291-92 (1948); *see Sanders* v. *United States*, 373 U.S. 1, 20-21 (1963) (granting remand for a hearing). The decisions below are in conflict with decisions of both this Court and with at least the Fourth, Fifth, Ninth and District of Columbia Circuits, which have held that an evidentiary hearing on abuse is required to resolve factual disputes regarding petitioner's explanation for not raising newly asserted claims in a previous petition.*

Stephens alleged four reasons why his previous petition did not raise the issues contained in his successor petition. The

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* *E.g.*, *Johnson* v. *Copinger*, 420 F.2d 395, 399 (4th Cir. 1969); *McShane* v. *Estelle*, 683 F.2d 867, 869-70 (5th Cir. 1982); *Vaughan* v. *Estelle*, 671 F.2d 152, 153-54 (5th Cir. 1982); *Potts* v. *Zant*, 638 F.2d 727, 747 (5th Cir.), *cert. denied*, 454 U.S. 877 (1981); *Haley* v. *Estelle*, 632 F.2d 1273, 1275-76 (5th Cir. 1980); *Zarola* v. *Crowen*, 433 F.2d 335, 336-37 (9th Cir. 1970); *United States* v. *Barnes*, 610 F.2d 888, 892-95 (D.C. Cir. 1979).

state answered the petition in wholly conclusory fashion, stating without supporting facts that each of Stephens' constitutional claims constituted an abuse. Thus, the only facts before the district court concerning abuse of the writ were those contained in Stephens' verified petition and proffered by Stephens' counsel during oral argument.

Stephens had no opportunity to present evidence at a hearing to rebut the state's allegation of abuse of the writ. The appropriate and orderly procedure in abuse cases is that once a habeas petitioner has pled facts which, if true, and not rebutted by the state, would establish that there had been no inexcusable default or deliberate bypass, the district court should afford petitioner an opportunity to prove those facts at an evidentiary hearing. On the record before the district court, combined with Stephens' two motions for an evidentiary hearing, *Price* and *Sanders* require an evidentiary hearing on abuse of the writ.

The argument before Judge Owens was brought on by Stephens to prevent the state from seeking a new execution date. It is a gross mischaracterization of events to conclude that it was an evidentiary hearing on abuse of the writ. *Counsel for Stephens were specifically told, by the district judge's law clerk, that they were not expected to bring witnesses to the argument which was to be held in a courtroom outside the Middle District of Georgia.* The purpose of the hearing, announced by the district court during the oral argument, was to rule on Stephens' application for a stay of execution.*

Dissenting from the denial of Stephens' suggestion for rehearing en banc, Judge Kravitch, who earlier had voted to affirm the district court's dismissal of the writ, called Stephens' opportunity to present evidence on abuse "crucial to the . . . holding." *Id.* at 629. Judge Kravitch found that there was a "serious question concerning [Stephens'] opportunity to proffer evidence." *Id.* Five judges of the Eleventh

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* Transcript of Oral Argument at 76 (previously filed with this Court).

Circuit, dissenting separately from Judge Kravitch, flatly concluded that Stephens "ha[d] not been afforded an evidentiary hearing on the abuse of the writ issue," and therefore that "*Sanders* ... precludes a finding of abuse of the writ." *Stephens* v. *Kemp*, 722 F.2d at 628-29.

The dissenting Eleventh Circuit judges found that Stephens' counsel

> proffered evidence based on newly available studies, (referring by name to the Baldus Study relied on in *Spencer*), summarized briefly the conclusions of the studies indicating a racially disproportionate imposition of the death penalty in Georgia, and when pressed for specifics stated that there would be presented the same evidence presented in the August, 1983 case of *McCleskey* v. *Zant*, No. C81-2434A in the Northern District of Georgia, and that the evidence would be presented tomorrow if the court pleased.

Id. at 628 n.1 (dissent from denial of rehearing en banc).

Stephens' counsel further stated that, at an evidentiary hearing, they could prove that his trial counsel did not seek competency proceedings, failed to conduct an independent investigation into any defense or mitigating evidence, failed to contact members of Stephens' family, failed to present witnesses or evidence during the penalty phase, and abandoned on appeal the involuntariness and inherent unreliability of Stephens' confession.

Absent an evidentiary hearing or leave to take discovery, Stephens could do no more than he did to rebut the abuse of the writ defense: plead his grounds in a verified petition and proffer his evidence to the court.

POINT II

THE DECISION BELOW THAT STEPHENS' EXPLANATIONS FOR NOT BRINGING HIS CONSTITUTIONAL CLAIMS IN HIS INITIAL PETITION DID NOT OVERCOME THE STATE'S ALLEGATION OF ABUSE OF THE WRIT CONFLICTS WITH THIS COURT'S DECISION IN *SANDERS* AND DECISIONS OF OTHER CIRCUIT COURTS

Stephens' petition for habeas corpus relief does not constitute an abuse of the writ. No suggestion has ever been made by the state or any court that he deliberately withheld issues from his prior petition in order to preserve them for a later day.

Stephens raised four grounds to excuse omissions from prior petitions: ineffectiveness of prior habeas counsel, recent development of evidence, intervening changes in the law, and prior non-exhaustion of state remedies. Under this Court's decision in *Sanders* v. *United States*, 373 U.S. 1 (1963), these explanations entitled Stephens to an evidentiary hearing on the merits of his claims. The failure of the district and circuit courts below to follow *Sanders*, and decisions in at least the First, Fifth, Seventh and Eighth Circuits adhering to *Sanders*,* not only deprived Stephens of his right to an evidentiary hearing, but also reflects the uncertainty regarding the reasons for excusing failure to bring a claim in an initial petition. *See, e.g., Robinson* v. *Fairman*, 704 F.2d 368, 370 n.5 (7th Cir. 1983) (declining to set "proper test for 'abuse of the writ' ").

Abuse of the writ is one of the most important issues confronting courts in death penalty litigation. This Court has not

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* *See, e.g., McLaughlin* v. *Gabriel*, 726 F.2d 7,8 (1st Cir. 1984); *Jones* v. *Estelle*, 722 F.2d 159, 163-64 (5th Cir. 1983) (en banc); *McShane* v. *Estelle*, 683 F.2d 867, 869-70 (5th Cir. 1982); *Vaughan* v. *Estelle*, 671 F.2d 152, 153 (5th Cir. 1982); *Potts* v. *Zant*, 638 F.2d 727, 740-41 (5th Cir.), *cert. denied*, 454 U.S. 877 (1981); *Haley* v. *Estelle*, 632 F.2d 1273, 1275 (5th Cir. 1980).

addressed the proper application of *Sanders* to successor petitions since that case was decided over twenty years ago. The lack of standards for determining whether petitioners' prior omissions are manipulative or justifiable is causing confusion among the courts and uncertainty as to petitioners' rights to assert claims of constitutional violations. *See, e.g., Jones* v. *Estelle*, 722 F.2d 159, 163 (5th Cir. 1983) (en banc) ("The outer limits of the abuse doctrine are easily stated. . . . The more difficult cases fall between the two extremes"); *Jordan* v. *Procunier*, 571 F. Supp. 371, 373 (E.D. Va. 1983) ("The definition of 'deliberate withholding' has been the source of much debate"). Members of this Court have recently expressed repeated frustration with the number of successor petitions reaching this Court, implicitly recognizing that *Sanders* offers little guidance by which the lower courts can determine whether to dismiss a potentially abusive petition.* This case presents the Court with an ideal opportunity to determine which grounds will justify a successor petition and to establish the basis for assessing their validity in the individual case.

A. *Ineffective Assistance of Prior Habeas Counsel Should Excuse Omissions From A Prior Habeas Petition*

Because Stephens' present counsel were "not prepared to offer any culpable admissions from petitioner's first habeas counsel" at oral argument, the district court dismissed Stephens' assertions that his prior counsel's preparation of his first petition was another example of their ineffective representation. *Stephens* v. *Kemp*, 578 F. Supp. at 108; *cf. Jones* v. *Estelle*, 722 F.2d 159, 167 (5th Cir. 1983) (en banc) (holding prior habeas counsel to sixth amendment standard).

* *See, e.g., Gray* v. *Lucas*, 104 S. Ct. 211 (1983) (Burger, C.J., concurring in denial of certiorari); *Spalding* v. *Aiken*, 103 S. Ct. 1795 (1983) (Burger, C.J., concurring in denial of certiorari); *cf. Woodard* v. *Hutchins*, 104 S. Ct. 752, 755 (1984) (White, J., and Stevens, J., dissenting) (noting that a second petition is not per se an abuse of the writ).

This insurmountable standard is at odds with the constitutional guarantee of effective assistance of counsel and should be repudiated by this Court.

Moreover, the holding by the courts below would result in the abuse of the writ doctrine being used to bar a claim of ineffective assistance by trial counsel, raised for the first time in a successor habeas petition, even though the very counsel whose assistance is questioned prepared the prior petition. Stephens' right to a hearing on his constitutional claims should not be forfeited by his counsel's inability to perceive or reluctance to assert his own ineffectiveness. Stephens had attempted on the record to raise his dissatisfaction with his appointed counsel prior to his trial to no avail. Stephens should be allowed in this proceeding, the first to be commenced in the absence of those appointed attorneys, to assert that their representation in its totality was inadequate.

B. *The Decisions Below Conflict With the Decisions of Other Circuit Courts That Newly Developed Facts Excuse Omissions From A Prior Petition*

Stephens alleged that his death sentence violates his eighth and fourteenth amendment rights, and he proferred as evidence a recently available statistical study performed by Dr. David Baldus, Distinguished Professor of Law at the University of Iowa (the "Baldus Study"), which concludes that racial prejudice remains a significant factor in Georgia's death sentences. The Eleventh Circuit's decision in *Stephens* dismissing the petition as abusive directly conflicts with the holdings in other circuits that a petitioner is permitted to bring a successor habeas petition when evidence becomes available subsequent to the completion of prior habeas proceedings.*

* *E.g., McLaughlin* v. *Gabriel*, 726 F.2d 7, 8 (1st Cir. 1984); *Walker* v. *Lockhart*, 726 F.2d 1238, 1241 (8th Cir. 1984) (en banc) (Arnold, J., concurring) *cert. denied*, 52 U.S.L.W. 3791 (U.S. April 30, 1984); *Sockwell* v. *Maggio*, 709 F.2d 341, 343-44 (5th Cir. 1983); *Robinson* v. *Fairman*, 704 F.2d 368, 369-70 (7th Cir. 1983). Stephens specifically relied on the standard in the Fifth Circuit that the abuse of the writ doctrine will not bar a successor petition "if a petitioner's unawareness of the facts is excusable."

Stephens' first habeas petition was filed in February 1979, and was dismissed by the district court on May 11, 1979, at about the same time Dr. Baldus was commencing his exhaustive study of the Georgia death penalty and years before even his most tentative conclusions would be reached. *Spencer* v. *Zant*, 715 F.2d 1562, 1582 (11th Cir. 1983) (noting that as late as May 1982 the Baldus Study was available only through oral testimony); *see Sullivan* v. *Wainwright*, 104 S. Ct. 450, 451 n.3 (1983). An extensive preliminary draft of the Baldus Study first became available in August 1983, and this petition is Stephens' first opportunity to raise claims based upon that study.

Inexplicably, the district court faulted Stephens for failing to generate a similar statistical study for use in his prior habeas petition. 578 F. Supp. at 107. A legal standard which would preclude an incarcerated, indigent, uneducated petitioner from raising constitutional claims because he failed to perform a sophisticated statistical analysis is wholly contrary to due process.

C. *The Decisions Below Conflict With The Decisions of Other Circuit Courts That Intervening Changes In Law Excuse Omissions From A Prior Petition*

Both for his claim of race discrimination in the imposition of the Georgia death penalty and for his claim that the trial court failed to instruct the jury that Stephens could not be sentenced to die unless he killed, attempted to kill, or intended to kill, Stephens explained that the claims did not exist when his first habeas petition was filed. Although several circuits have held that an intervening change in the law is one ground on which failure to raise a claim in a prior

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Vaughan v. *Estelle*, 671 F.2d 152, 153 (5th Cir. 1982); *accord Jones* v. *Estelle*, 722 F.2d 159, 165 (5th Cir. 1983) (en banc) (no abuse when petitioner asserts a development in facts "which was not reasonably knowable before"); *Haley* v. *Estelle*, 632 F.2d 1273, 1275 (5th Cir. 1980) ("it is clear that a petitioner cannot be charged with having abused the writ of habeas corpus if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based").

habeas petition may be excused, Stephens' petition was dismissed as an abuse of the writ.*

The district court and Eleventh Circuit gave only the most cursory treatment to Stephens' claim that he was entitled to an instruction at the penalty phase that he should not be sentenced to death unless the jury found that he took life, attempted to take life or intended to take life. That claim is clearly based on the groundwork laid by this Court in *Enmund* v. *Florida*, 458 U.S. 782 (1982), decided three years after Stephens' 1979 petition was dismissed by the district court.

The courts below never addressed whether intervening law sufficiently excused the omission from the prior petition of Stephens' eighth and fourteenth amendment claims of race discrimination in the implementation of the Georgia death penalty. In his November 1983 petition, Stephens relied on the September 30, 1983 decision in *Spencer* v. *Zant*, 715 F.2d 1562 (11th Cir. 1983), the first available decision in the Eleventh Circuit recognizing the merits of his race discrimination claims.**

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* *See, e.g., Smith* v. *Kemp*, 715 F.2d 1459, 1468 (11th Cir.), *cert. denied*, 103 S. Ct. 510 (1983); *Jones* v. *Estelle*, 722 F.2d 159, 169 (5th Cir. 1983); *Sockwell* v. *Maggio*, 709 F.2d 341, 344 (5th Cir. 1983); *Robinson* v. *Fairman*, 704 F.2d 368, 370 (7th Cir. 1983); *Sanders* v. *United States*, 373 U.S. 1, 16-17 (1963).

** As five of the twelve judges of the Eleventh Circuit noted in their dissent from the denial of Stephens' motion for rehearing en banc:

> Nor can the record in this case support a finding of abuse of the writ of habeas corpus, under the principles established in *Sanders* v. *United States*, [373 U.S. 1 (1963)]. At the time of Stephens' first state and federal petitions, the then extant evidence and the then established law appeared to preclude [his claim of racial discrimination] as a matter of law. *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *Smith* v. *Balkcom*, 671 F.2d 858, *modifying* 660 F.2d 573 (5th Cir. 1981). It was only long after Stephens' previous habeas petitions that the particularized statistical study became available, which the *Spencer* court held on September 30, 1983, was sufficient to require an evidentiary hearing on the merits of the discrimination claim.

Stephens v. *Kemp*, 722 F.2d 627, 628-29 (dissenting opinion) (footnote omitted).

Since Stephens' successor petition was dismissed, the Eleventh Circuit has granted en banc consideration to three petitions alleging those same claims. *Spencer* v. *Zant*, 715 F.2d 1562 (11th Cir. 1983) (rehearing en banc granted December 13, 1983); *Ross* v. *Hopper*, 716 F.2d 1528 (11th Cir. 1983) (rehearing en banc granted March 28, 1984); *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga.), *hearing en banc granted*, No. 84-8176 (11th Cir. March 28, 1984). Yet the Eleventh Circuit, by a 6-6 non-decision, would deny Stephens any consideration of race discrimination claims indistinguishable from the claims raised in *Spencer*, *Ross* and *McCleskey* because he failed, five years ago, to raise these claims, which were then apparently precluded and today remain unsettled.

D. *This Court Should Resolve the Severe Conflict Among the Circuits as to Whether a Failure to Exhaust Constitutes an Abuse of the Writ*

Four of the issues in Stephens' successor petition were initially raised by amicus counsel in the appeal of his first petition. Affirming the dismissal of Stephens' first petition, the Fifth Circuit noted that "[t]here is no indication whether state remedies have been sought as to these issues." 716 F.2d at 277. In fact, Stephens' prior counsel had never identified the issues raised by amicus, nor the other issues contained in Stephens' present petition. State remedies on all of Stephens' present issues therefore have only been exhausted since the completion of his prior habeas proceedings.

A four-Justice plurality of this Court in *Rose* v. *Lundy*, 455 U.S. 509, 521 (1982) (O'Connor, J., joined by Burger, C.J., Powell, J., Rehnquist, J.), concluded that a petitioner who chooses to proceed only with his exhausted claims risks dismissal of subsequent federal petitions. In contrast, three Justices asserted that "*Sanders* made it crystal clear that dismissal for 'abuse of the writ' is *only* appropriate when a prisoner was free to include all his claims in his first petition, but *knowingly* and *deliberately* chose not to do so in order to get more than 'one bite of the apple.' " *Id.* at 536 (Brennan, J. joined in relevant part by Marshall, J. and White. J.)

(emphasis in original). There has been no suggestion by anyone that Stephens knowingly and deliberately set aside some of his claims.

Faced with the absence of a definitive decision by this Court, the lower courts have reached contradictory results as to whether a petitioner can be permitted to raise claims in a successor petition which were not exhausted when his first petition was filed.* In light of this confusion, this Court should grant certiorari in *Stephens* to resolve this issue.

POINT III

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER AFFIDAVITS OF PREVIOUS COUNSEL ARE A PRECONDITION TO A HEARING ON INEFFECTIVE ASSISTANCE

The Eleventh Circuit affirmed the district court's refusal to hold a hearing on Stephens' sixth amendment claim because he did not proffer "culpable admissions [of ineffectiveness by his] first habeas counsel". 578 F. Supp. at 108. Such an unreasonable requirement will necessarily result in grotesque and arbitrary results, particularly where, as here, the trial record standing alone established counsel's ineffectiveness and former counsel refused to co-operate with Stephens

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* *Compare Powell* v. *Spalding*, 679 F.2d 163, 165-166 n. 2 (9th Cir. 1982) (successor petition raising previously unexhausted claims not abusive) *and United States ex rel. Rivera* v. *Franzen*, 564 F. Supp. 723, 725-26 (N.D. Ill. 1983) (same) *and Roland* v. *Mintzes*, 554 F. Supp. 881, 886 (E.D. Mich. 1983) (same) *and Martin* v. *White*, 538 F. Supp. 326, 327-28 (W.D. Mo. 1982) (same) *with Jones* v. *Estelle*, 722 F. 2d 159, 169 (5th Cir. 1983) (en banc) (prior nonexhaustion not an excuse for omission from prior petition) *and Jones* v. *Hess*, 681 F. 2d. 688, 695 (10th Cir. 1982) (petitioner who raises only exhausted claims risks dismissal of successor petition) *and Boles* v. *Foltz*, 559, F. Supp. 1302, 1305 n.5 (E.D. Mich. 1983 (same) *and Cartera* v. *Mitchell*, 553 F. Supp 866, 871, (E.D. Va. 1982) (same) *and Fugett* v. *Marshall*, 541 F. Supp. 293, 294 (S.D. Ohio 1982) (same); *cf. Niziolek* v. *Ashe*, 694 F. 2d 282, 285 n.2 (1st Cir. 1982) (noting but not resolving issue).

present habeas counsel.* In addition, in this case, Stephens presented affidavit evidence that trial counsel had not investigated possible mitigation testimony of neighbors and family members to determine if they knew of any reasons why Stephens did not deserve to die. The implications of this harsh burden on defendants' sixth amendment right to effective assistance should be examined by this Court.

The *Stephens* decisions are not isolated examples of an anomalous result. They are part of a series of disturbing holdings in which the Eleventh Circuit appears to require, without sound justification, admissions by prior counsel of their ineffectiveness to sustain a sixth amendment claim.** Thus, in *Stanley* v. *Zant*, 697 F.2d 955 (11th Cir. 1983), the Eleventh Circuit, applying a presumption of attorney competence, held that Stanley had not met his burden of proving that defense counsel's failure to investigate or present character evidence was not a reasonable strategic choice. The only apparent means by which Stanley could have proven his claim was to present a culpable admission of his trial counsel that there was no strategic reason for his lack of investigation.

The record evidence in *Stephens*, coupled with the evidence Stephens would have presented at an evidentiary hearing, establishes a complete abdication of counsel's duty to investigate or prepare for trial. *Washington* v. *Strickland*, 693 F.2d 1243, 1257 (5th Cir. 1982) (en banc), *cert. granted*, U.S. , 103 S. Ct. 2451 (1983). The record is replete with examples of his trial counsel's failure, from the inception of

* Stephens' prior counsel refused to co-operate with his present counsel. Stephens could not obtain their depositions without leave of court pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases in the District Court, 28 U.S.C. foll. § 2254, and the district court denied Stephens' motion to depose his prior counsel.

** *See, e.g., King* v. *Strickland*, 714 F.2d 1481, 1490 (11th Cir. 1983) (ineffective assistance at penalty phase found where "counsel admitted he was unprepared"); *Adams* v. *Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983) (ineffective assistance claims dismissed where petitioner "did not call trial counsel to testify at the state hearing and gave no indication to the district court as to how trial counsel would testify at any district court hearing"), *cert. denied*, 104 S. Ct. 745 (1984).

their involvement with the case, to protect Stephens' rights or to prepare for his defense.

Had Stephens' trial counsel conducted an investigation, they could have learned from the police stenographer that, despite testimony at the trial by the interrogating police officer that Stephens' confession was an uninterrupted narrative, the four-page statement was in fact pieced together and formed into a narrative from a rambling interrogation that lasted in excess of two hours. Had they spoken with the interrogating officer, they would have learned that Stephens "confessed" to killing his accomplice—a crime which never occurred and was not one of those facts selectively linked to form the "narrative confession".

Contrary to counsel's assurances to the trial judge, on the record, that they had investigated the state's case, "including interviewing the witnesses," Stephens could have shown at an evidentiary hearing, that trial counsel failed to interview the state's witnesses. Indeed they never spoke to the prosecutor to obtain witnesses' names, to plea bargain or to obtain discovery. As far as can be determined, none of the witnesses at trial were contacted before the trial and no review of the state's scientific evidence was made.

Further, Stephens' trial counsel allowed him to be tried before an all-white, all-male jury drawn from a jury venire from which blacks and women were systematically excluded.* An objection to those venires should have been made in order to render effective assistance. *See Birt* v. *Montgomery*, 725

* At that time of Stephens' trial, the jury lists were compiled by the board of jury commissioners, who selected those they believed to be "intelligent and upright citizens" from voter lists that displayed race and sex. *See* 1973 Ga. Laws § 59-106, p. 485-86. As a result, the jury lists of Bleckley County underrepresented women by 43.45%, and blacks by 16.5%, which are certainly statistically significant disparities. *See, e.g., Turner* v. *Fouche*, 396 U.S. 346, 359 (23% disparity); *Hernandez* v. *Texas*, 347 U.S. 475, 480 (1954) (14%); *Machetti* v. *Linahan*, 679 F.2d 236, 240 (11th Cir. 1982) (36% and 42%), *cert. denied*, 103 S. Ct. 763 (1983); *Porter* v. *Freeman*, 577 F.2d 329, 330 (5th Cir. 1978) (20.4%).

F.2d 587, 598 (11th Cir. 1984) (en banc) (failure to investigate composition of jury venire may constitute ineffective assistance). Stephens personally objected to the jury before which he was to be tried, but his trial counsel never sought the venire lists, and never challenged the clearly unconstitutional jury.

Most inexcusably, they never raised Stephens' most plausible line of defense—that Stephens' accomplice, Claude Sampson, was the person who killed Mr. Asbell. This argument would have been consistent with Stephens' testimony during the penalty phase, as well as with the evidence at trial and Sampson's history of violent behavior.

Trial counsel did little more than attend the trial and put the state to its proof. They failed even to attend the initial oral argument in the Georgia Supreme Court. Moreover, they abandoned the appeal from the admission into evidence of Stephens' unreliable confession, the sole direct evidence linking Stephens to the murder.

If the district court had afforded Stephens the evidentiary hearing to which he was entitled, supported by that court's subpoena power, he could have proven these and other facts his trial counsel never uncovered. In his petition, Stephens presented affidavits which demonstrate his trial counsel's abject failure to contact those with the most complete and intimate knowledge of Stephens' character and to present any evidence in mitigation of the sentence of death, other than Stephens' unprepared recanting of his confession.* It defies credulity to speculate, as the courts below must have done, that Stephens' previous counsel had a sound strategic justification for completely neglecting to prepare for the penalty phase. It is intolerable for a court to refuse to address the possibility of a denial of a constitutional right on such ungrounded speculation.

* The record shows that counsel did not request a recess to prepare Stephens for the testimony that would determine if he would be sentenced to death. Since counsel were out of communication with Stephens, they could not even have known what he would say.

Stephens can demonstrate his counsel's repeated lapses in preserving his rights and their lack of trial preparation. Absent an evidentiary hearing on these claims, however, no fair assessment can be made of the prejudice he suffered from his counsel's failings.* Given the stark example of injustice worked by the newly imposed Eleventh Circuit standard, this Court should grant certiorari to address whether a court can, consistent with the sixth amendment, require "culpable admissions" as a precondition to a hearing on a claim of ineffective assistance of counsel, when the petition offers substantial proof of counsel's complete and unconscionable failure to investigate the facts and to safeguard constitutional rights.

POINT IV

THE LOWER COURT ERRED IN DENYING STEPHENS AN EVIDENTIARY HEARING TO PROVE THAT RACE IS AN IMPERMISSIBLE FACTOR AFFECTING GEORGIA DEATH SENTENCES

At oral argument before the district court, Stephens proffered the Baldus Study, which proves, through multiple statistical analyses, that black defendants are more likely than white defendants to be sentenced to death, that a defendant is more likely to be sentenced to death if the victim is white, and that black defendants convicted of murdering white victims receive the death sentence at a rate so disproportionate that

* *See Washington* v. *Strickland*, 693 F.2d 1243, 1259 n.26 (5th Cir. 1982) (en banc), *cert. granted*, U.S. , 103 S. Ct. 2451 (1983) ("the ineffectiveness of counsel [was] so pervasive that a particularized inquiry into prejudice would be 'unguided speculation' "); *United States* v. *Porterfield*, 624 F.2d 122, 125 (10th Cir. 1980) (same); *United States ex rel. Rivera* v. *Franzen*, 564 F. Supp. 723, 727 (N.D. Ill. 1983) (in view of " 'failure to investigate' ineffective assistance claim, . . . there is no way to examine the record of the trial to determine if no rational jury could acquit, since the particular defense was never investigated, much less presented").

no nonracial factor can account for this occurrence.* The issue of the use of statistical data to prove eighth and fourteenth amendment claims is arising with increasing frequency, and it demands attention by this Court.

A. *This Court Should Determine When Statistical Evidence Can Establish That Implementation of A Capital Punishment Statute Violates The Equal Protection Clause*

The district court denied Stephens' request for a hearing to submit the Baldus Study to make a prima facie showing that his death sentence violates the equal protection clause of the fourteenth amendment.

Although circuits that have been faced with claims based on statistical studies of lesser scope and detail than the Baldus Study have rejected facially inadequate statistical data, these courts have also expressly refused to foreclose presentation of sound statistical evidence of an equal protection claim.** Thus in *Smith* v. *Balkcom*, 671 F.2d 858, 859 (5th Cir.) (on rehearing), *cert. denied*, 103 S. Ct. 181 (1982), the Fifth Circuit modified its earlier decision in the same case to clarify that, "[i]n some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose." *Accord Adams* v. *Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 745 (1984); *see Furman* v.

* Stephens further proferred the transcript of the evidentiary hearing in *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga.), *hearing en banc granted*, No. 84-8176 (11th Cir. Marc. 28, 1984), which was then pending decision.

** *See Adams* v. *Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983) (inadequate statistical sample), *cert. denied*, 104 S. Ct. 745 (1984); *McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1556 (11th Cir. 1983) (failure to consider aggravating circumstance), *cert. denied*, 52 U.S.L.W. 3776 (U.S. April 23, 1984); *Smith* v. *Balkcom*, 671 F.2d 858, 859-60 & n.33 (5th Cir.) (on rehearing) (improper raw data and failure to consider racially neutral variables), *cert. denied*, 103 S. Ct. 181 (1982); *Spinkellink* v. *Wainwright*, 578 F.2d 582, 614 n.40 (5th Cir. 1978) (same), *cert. denied*, 440 U.S. 976 (1979).

Georgia, 408 U.S. 238, 389-90 n.12 (1972), (Burger, C.J., dissenting) ("While no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would have to be made, taking all relevant factors into account").

Not surprisingly, the Baldus Study has been proferred by several Georgia death row inmates in addition to Stephens. In *Spencer* v. *Zant*, 715 F.2d 1562, 1579 (11th Cir. 1983), and *Ross* v. *Hopper*, 716 F.2d 1528, 1581 (11th Cir. 1983), panels of the Eleventh Circuit held that habeas petitioners were entitled to evidentiary hearings based upon the Baldus Study. The Eleventh Circuit subsequently granted rehearing in *Spencer* to reconsider en banc the relevance of statistical data to eighth and fourteenth amendment claims. *Spencer* was reheard in January 1984. In February 1984, the district court in *McCleskey* v. *Zant*, 580 F. Supp. 330 (N.D. Ga. 1984), dismissed a fourteenth amendment equal protection claim by a death-sentenced habeas petitioner after hearing testimony by Dr. Baldus. On March 28, 1984, the Eleventh Circuit *sua sponte* ordered initial hearing en banc in *McCleskey*, ordered rehearing en banc in *Ross*, and stayed determination of *Spencer* pending resolution of *McCleskey* and *Ross*.

In past cases this Court has recognized statistical data as a well-established means of demonstrating both discriminatory purpose and impact necessary to an equal protection claim.* With recent and increasing reliance upon statistical studies by death-sentenced habeas petitioners, a pressing need has arisen for this Court to recognize the circumstances under which

* *Eg. Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"); *see Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.) ("In the problem of racial discrimination, statistics often tell much, and Courts listen '), *aff'd*, 371 U.S. 37 (1962) *accord Washington* v. *Davis*, 426 U.S. 229, 242 (1976) (same).

statistical evidence will prove that a death sentence was imposed in violation of the equal protection clause.

Statistical proof of discrimination is appropriate where, as here, a facially neutral statute is dependent on the exercise of discretion. *See, e.g., Turner* v. *Fouche*, 396 U.S. 346, 353-55 (1970); *Searcy* v. *Williams*, 656 F.2d 1003, 1007 (5th Cir. 1981), *aff'd mem. sub nom., Hightower* v. *Searcy*, 455 U.S. 984 (1982). In the absence of statistical evidence, racial biases might otherwise be impossible to prove. *Carson* v. *Polley*, 689 F.2d 562, 581 (5th Cir. 1982) ("The subjective thoughts and emotions that may have influenced a juror's deliberation are shielded from inquiry"); *see* Fed. R. Evid. 606(b). Stephens asks that this Court consider his case to determine that the Baldus Study should be admitted at an evidentiary hearing to establish a prima facie showing that Georgia's imposition of the death penalty impermissibly considers race in violation of the equal protection clause.

B. *This Court Should Determine Whether A Facially Valid Capital Punishment Statute May Nonetheless Violate The Eighth Amendment If Its Implementation Is Based Upon Race*

In *Stephens* and other cases that raise an eighth amendment challenge to the pervasive effect of racial factors in the implementation of the Georgia death penalty, the Eleventh Circuit has devised a standard for resolving eighth amendment claims which is incorrect under this Court's precedents and should not be allowed to stand.

In *Spinkellink* v. *Wainwright*, 578 F.2d 582, 613 (5th Cir. 1978) (footnote omitted), *cert. denied*, 440 U.S. 976 (1979), the Fifth Circuit held "that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed.' Faced with this precedent, the Fifth Circuit in *Smith* v. *Balkcom*, 660 F.2d 573, 584-85 (5th Cir. 1981) (emphasis added), *modified in part*, 671 F.2d 858 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 181 (1982), attempted to clarify the *Spinkellink* decision by stating that *Spinkellink*

did not create a "broad prohibition" against "challenges to the *application* of a death penalty statute." As the *Smith* court described *Spinkellink:* "It merely established that in the absence of proof of 'some specific act or acts evidencing intentional or purposeful . . . discrimination against [the petitioner]' on the basis of race, sex, or wealth, a petitioner is not entitled to relief on habeas corpus." *Id.* at 585, *quoting Spinkellink*, 578 F.2d at 614 n.40; *accord Spencer* v. *Zant*, 715 F.2d 1562, 1581 (11th Cir. 1983), *rehearing en banc granted*, 715 F.2d at 1583.

An examination of the *Spinkellink* decision, however, reveals that the *Smith* court relied in its interpretation on language addressed to Spinkellink's equal protection claim, and not his eighth amendment claim. In an effort to avoid overruling the obviously incorrect holding that an eighth amendment challenge cannot be made to the implementation of a facially valid capital punishment statute, *see, e.g., Godfrey* v. *Georgia*, 446 U.S. 420 (1980), the *Smith* court engrafted into the eighth amendment a requirement that the discriminatory intent be shown before a capital punishment statute may be struck down as operating in an arbitrary and capricious manner.

This intent requirement is alien to eighth amendment condemnation of wanton and freakish application of the death penalty. *Furman* v. *Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J. concurring). In *Godfrey* v. *Georgia*, 446 U.S. 420, 441 (1980) (Marshall, J. concurring), this Court struck down the statutory aggravating circumstance permitting imposition of a death sentence when murder was vile, horrible and inhuman as violative of the eighth amendment even though "[t]he Georgia court's inability to administer its capital punishment statute in an evenhanded fashion is not necessarily attributable to any bad faith on its part."*

**Accord Gardner* v. *Florida*, 430 U.S. 349, 358 (1971) (opinion of Stevens, J., joined by Stewart, J., and Powell, J.) ("It is of vital importance to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion") (emphasis added); *see, e.g., Enmund* v. *Florida*, 458 U.S. 782 (1982); *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977).

Stephens proffered the Baldus Study to show that it remains true in Georgia that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Furman* v. *Georgia*, 408 U.S. at 310 (Stewart, J., concurring). If "[t]he high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require . . . judges to see to it that general laws are not applied sparsely, selectively and spottily to unpopular groups," *id.* at 256 (Douglas, J., concurring), then the Eleventh Circuit should not be permitted to require that a death-sentenced petitioner demonstrate not only that race has a wanton and freakish effect on death sentence determinations, but also that this effect is an intentional one. This Court should grant certiorari to correct this adulteration of eighth amendment protections.

POINT V

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER STEPHENS' JURY SHOULD HAVE BEEN INSTRUCTED AT THE PENALTY PHASE THAT DEATH CANNOT BE IMPOSED WHEN THE ACCUSED DID NOT TAKE LIFE, ATTEMPT TO TAKE LIFE, OR INTEND THAT LIFE WOULD BE TAKEN

This Court's decision in *Enmund* v. *Florida*, 458 U.S. 702 (1982), bars imposition of the death penalty unless the defendant kills, attempts to kill, or intends to kill. Its central concern is not with the elements necessary to prove the substantive offense of murder but rather with the grounds on which a capital sentence is imposed. Acknowledging this emphasis, the Fifth Circuit in *Reddix* v. *Thigpen*, 728 F.2d 705 (5th Cir. 1984), held that jury instructions at the penalty phase must be carefully scrutinized to ensure a finding of the requisite intent. The *Reddix* court concluded that any ambiguity as to the jury's finding of an intent to kill should be eliminated by "curative instructions at the penalty phase." *Id.* at 710.

The Eleventh Circuit's decision in *Stephens* would permit the imposition of the death sentence despite the ambiguity created by Stephens' testimony at the penalty phase disavowing involvement in the murder. This Court should grant certiorari to resolve this conflict between the Fifth and Eleventh Circuits' interpretations of *Enmund*. In any event, this Court should consider whether, upon the record in this case, the absence of an *Enmund* instruction at the penalty phase renders imposition of the death sentence constitutionally defective.

After exercising his absolute right under the fifth amendment not to testify during the guilt phase of his trial, Stephens took the witness stand during the penalty phase. Although admitting his involvement in the robbery and kidnapping, Stephens contradicted some of the "confession" that had been admitted at the guilt phase. In particular, Stephens testified that he had no intent either to injure or to kill Mr. Asbell and instead had told his accomplice to permit Mr. Asbell to escape. Stephens' testimony placed him, unarmed, outside of the house in which the killing occurred.

This testimony contradicted the *only* evidence against him on the most critical issue for imposition of the death penalty—whether Stephens intended the death of Mr. Asbell. No mention was made of Stephens' testimony, however, in the minimal penalty phase instructions. The court did not instruct the jury that they could consider Stephens' testimony in mitigation of the penalty, or that their finding as to intent with respect to guilt or innocence did not foreclose a different finding in the penalty phase with respect to imposition of a sentence. Moreover, the jury was not instructed that Stephens' exercise of his fifth amendment right not to testify during the guilt phase of his trial could not be considered in determining what weight to give his penalty phase testimony. Stephens' testimony could not be properly evaluated during the penalty phase unless the jury, during the penalty phase, had been given this instruction, and an instruction that they could not impose the sentence of death unless they found, beyond a reasonable doubt, that Stephens took life, attempted

to take life, or intended that life be taken. *See Enmund* v. *Florida*, 458 U.S. 782 (1982).

In *Enmund* v. *Florida*, 458 U.S. 782 (1982), this Court held that the death penalty is disproportionate to the offense charged when, as Stephens testified here, the defendant did not participate in or intend the murder. This Court reversed the imposition of the death penalty on Enmund, holding that it was a disproportionate punishment for one who did not have an intent to kill.

In addition to the strictures of *Enmund*, the principles underlying the need for a bifurcated trial required that the trial court should have specially instructed the jury at the penalty phase of Stephens' trial. In *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976) this Court, to avoid the arbitrary and capricious application of the death penalty condemned in *Furman* v. *Georgia*, 408 U.S. 238 (1972), determined that the exercise of discretion by a sentencing body had to be limited and directed. To achieve this goal, the Court prescribed "a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195.

Bifurcated procedures permit certain information, such as the defendant's version of his involvement in criminal activity, which would be highly prejudicial to the defendant at the guilt phase, as well as any mitigating factors, to be considered at the penalty phase. *Id.* at 190-91, 195. The effective implementation of such procedures permits mitigating evidence to reach the jury for consideration in sentencing, as this Court has determined is required by the Constitution. In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court considered the constitutionality of applying the death penalty in another case involving a defendant who had merely aided and abetted other persons in a robbery which resulted in a killing. The *Lockett* Court determined that a sentencing scheme which prevented the consideration of mitigating circumstances, such as the degree of involvement of the defendant in the crime, violated the eighth and fourteenth amendments. *Id.* at 604.

To preserve Stephens' fifth amendment rights while advancing the principles announced in *Gregg* and *Lockett*, Stephens' jury should have been instructed, when deciding what weight to give his testimony during the penalty phase, not to attach significance to Stephens' failure to testify during the guilt phase. The efficacy of bifurcation of the liability and penalty phases in capital trials may well be substantially impaired if the jury is permitted to discount a defendant's testimony because it was not given during the guilt phase of trial. On the other hand, the purpose of a bifurcated trial, proper respect for a defendant's exercise of the right to avoid self-incrimination, and recognition of the *Lockett* rule that the jury should be free to consider "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death", 438 U.S. at 604, would all be advanced by requiring the suggested instructions. Thus, this Court should adopt such a rule for application in circumstances when the defendant testifies concerning his culpability in the crime for the first time during the penalty phase of trial.

CONCLUSION

Since the decision below denies Stephens his right, guaranteed to him by decisions of this Court, to a hearing on abuse of the writ, raises significant and recurring policy considerations regarding petitioner's explanations for not raising constitutional claims in an initial petition and conflicts with decisions of other circuit courts on what explanations overcome allegations of abuse, this Court should issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8844

Alpha Otis O'Daniel
STEPHENS,

Petitioner-
Appellant

versus

Ralph KEMP, Superintendent,
Georgia Diagnostic &
Classification Center,

Respondent-
Appellee.

Appeal from the United States
District Court for the Middle
District of Georgia

(December 9, 1983)

Before FAY, VANCE and KRAVITCH,
Circuit Judges.

BY THE COURT:

Petitioner Alpha Otis O'Daniel

Stephens is scheduled to be executed by

the state of Georgia on December 14, 1983. He now presents to the court his emergency application for a certificate of probable cause and for a stay of execution. The United States District Court for the Middle District of Georgia denied the relief here sought by its judgment of November 21, 1983.

This is the third occasion on which this court has considered various pleas by petitioner since he was convicted and sentenced to death of [sic] January 21, 1975 for the murder of Roy Asbell in Bleckley County, Georgia in 1974. His conviction was affirmed by the Georgia Supreme Court, Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986 (1976). Thereafter he sought relief by state habeas corpus proceedings which was ultimately denied in the Georgia Supreme Court, Stephens

v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991 (1978). He then filed his petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia which was denied on May 11, 1979. On appeal to the United States Court of Appeals for the Former Fifth Circuit the denial of relief by the district court was reversed. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified on rehearing, 648 F.2d 446 (5th Cir. 1981). Respondent sought and was granted review by the United States Supreme Court, which certified a question to the Supreme Court of Georgia, Zant v. Stephens, 456 U.S. 410 (1982). After receipt of the Georgia court's response, Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982), the Supreme Court of the United States reversed the deci-

sion of the fifth circuit, Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733 (1983). On remand this court rendered a decision affirming the decision of the district court which had denied habeas relief, Stephens v. Zant, 716 F.2d 276 (5th Cir. 1983).

Petitioner thereafter filed a second state habeas petition which was dismissed by the Georgia superior court on November 10, 1983. His application for certificate of probable cause to appeal the adverse decision was denied.

On November 15, 1983 petitioner initiated the present proceeding in the district court. A hearing was held on that same day and six days later an order entered denying relief. The application to this court was filed on December 1, 1983 and the matter set on December 7, 1983 before this panel in an

expedited proceeding. Here as in the district court the petitioner presents seven constitutional claims which were stated by petitioner's counsel as follows:

(1) he was denied effective assistance of counsel resulting in his conviction, death sentence and denial of adequate appellate and habeas corpus review;

(2) he was sentenced to death without any jury instruction or finding that he must have killed, attempted to kill or intended to kill in order to receive the death penalty;

(3) he was convicted by an unconstitutionally selected all white, male jury that was chosen from an array which systematically excluded and significantly underrepresented blacks and women;

(4) he was convicted on the basis of an involuntary and patently unreliable confession affected by significant alcohol and drug use;

(5) the trial judge failed to hold a hearing on his competency to stand trial despite evidence that he did not communicate with counsel or the court, and

was unable to assist in his own defense;

(6) the Georgia death penalty statute is administered in an arbitrary and discriminatory manner based on the race of the defendant and race of the victim; and

(7) appellate procedures in Georgia did not provide an adequate review of the proportionality of his death sentence resulting in a comparison with cases most of which had the death sentence later vacated.

Among petitioner's claims may be one or more that would have necessitated an evidentiary hearing if presented properly in his first petition. The case before us, however, is a second or successive petition, governed by Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts:

> Successive petitions. A second or successive petition

> may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent has plead [sic] abuse of the writ, shifting to petitioner the burden to prove he has not engaged in that conduct. Price v. Johnson, 334 U.S. 266, 292 (1948). At the hearing on November 15, 1983 petitioner was afforded the opportunity to which he was entitled under Potts v. Zant, 638 F.2d 727, 747 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981) to explain or rebut the abuse of the writ allegation. The district court thereafter found that petitioner had failed to meet his burden and that his claims constitute an abuse of the writ. In its judgment of November

21, 1983 it dismissed the petition, denied a certificate of probable cause and denied a stay.

There is no disagreement among the parties as to the standard applicable to second and subsequent petitions for habeas corpus which present wholly new issues. In order to constitute abuse, presentation of such issues must result from (1) the intentional withholding or intentional abandonment of those issues on the initial petition or (2) inexcusable neglect. See Potts, 638 F.2d at 740-41. Our inquiry in this court focuses on the correctness of the district court's holding that petitioner failed to show he was not guilty of inexcusable neglect.

Petitioner says that three of the seven claims before us could not have been presented in prior petitions be-

cause they are the product of intervening changes in the law or intervening facts which have subsequently been developed.

Under the first of these claims, petitioner contends that the Constitution required that the jury which sentenced him to death in 1975 should have been given an instruction patterned after the Supreme Court's subsequent holding in Enmund v. Florida, 458 U.S. 782 (1982). In light of our decision in Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983) this claim plainly lacks merit. Petitioner's admission that he participated in the robbery, kidnapping and murder notwithstanding his assertion that an accomplice actually pulled the trigger, renders Enmund inapplicable.

Petitioner seeks to excuse his prior failure to present the third and

sixth of his present claims on the ground that they are based on newly discovered statistical evidence. As to the third claim, the argument is facially unsound. The jury challenge was not made at any time before the second habeas petition, over eight years after trial. The statistical evidence on which the claim purportedly rests was available at all times. The sixth claim relies on this court's recent decision in Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983). In claiming that Georgia's death penalty statute is administered in an arbitrary and discriminatory manner in violation of his eighth and fourteenth amendment rights, petitioner must prove "'some specific act or acts evidencing intentional or purposeful . . . discrimination against [the petitioner]' on the basis of race, sex or wealth."

Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858, cert. denied, ___ U.S. ___, 103 S. Ct. 181 (1982). Petitioner alleges that a 1980 study by a Dr. David Baldus supports his claim. This is a similar contention to that made in Spencer. Here, however, the similarity ends. In Spencer, which involved a first petition for habeas corpus, the so-called Baldus study was proffered as evidence at the district court hearing. A panel of this court held that the evidence as proffered was material and should have been received. In the present case the issue arose at a hearing concerning abuse of the writ but no such proffer was made by petitioner. Indeed, no evidence of any kind was proffered that would either establish petitioner's claim or demon-

strate that the claim was supported by intervening facts.[1]

The only excuse tendered by petitioner for his failure previously to present his contentions with respect to the voluntariness of his confession, his competency to stand trial and the adequacy of Georgia's proportionality review is the claimed ineffectiveness of his prior counsel both at trial and during the prior habeas corpus proceedings. All of the remaining issues therefore devolve into the ineffective assistance of counsel issue.

The task of this petitioner's counsel presented obvious difficulties. After escaping from county jail, petitioner was interrupted committing a burglary in Twiggs County by his victim whom he and an accomplice robbed, kidnapped, drove into Bleckley County and brutally killed; he was caught the next morning with the murder weapon in his possession. Although he confessed and pleaded guilty in Twiggs County to armed robbery, kidnapping with bodily injury, and the theft of a motor vehicle, he would not cooperate or even communicate with his attorneys in the murder prosecution. Petitioner was represented initially by two local attorneys, one of whom withdrew after trial to become a district attorney and the other of whom withdrew after the filing of the first habeas petition upon his appointment to the superior court bench. Thereafter petitioner was represented in the state courts, in the district court, in this

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1 Plaintiff's suggestion that he could produce evidence at a subsequent hearing does not satisfy his burden.

court and in the Supreme Court by additional attorneys whose qualification and experience in capital cases are well known to this court. From our reading of the record of trial and the reported appeals, no ineffective assistance is apparent; it appears that a thoroughly vigorous attempt has been made to save petitioner from death. Counsel's line of defense was reasonable under the circumstances and, indeed, at one stage persuaded the fifth circuit that the writ should be granted.

Petitioner's present counsel have gathered several affidavits of family members and childhood acquaintances which indicated that they would have been willing to testify on his behalf at the sentencing phase but were not interviewed. Such evidence, even if properly presented, does not of itself establish

ineffectiveness of counsel. See Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). In their papers and in argument present counsel made sweeping and extravagant allegations concerning the original counsel's failure to conduct any investigation or to make any preparation for trial.[2] Before the district court, however, they were unable to proffer any non-record evidence to support their

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2 Although present counsel's allegations in no way diminish petitioner's rights under the Constitution, they underline our continuing concern that seemingly automatic attacks on unsuccessful counsel by subsequent habeas counsel will inevitably lessen the willingness of competent counsel to accept capital cases. To be sure, habeas counsel has a duty to make such allegations when they are supportable. The allegations in this case, however, were made without even the most superficial inquiry and without any substantial evidence. In our view wholly unsupported attacks on the competency and effectiveness of prior counsel will not be tolerated.

claim but sought merely to have execution stayed and time allowed for discovery. Nothwithstanding their having been actively engaged in the conduct of this matter for between two and three months, present counsel had failed to make any meaningful inquiry into the handling of petitioner's case by his original defense counsel or prior habeas counsel. By delaying the filing of the second state petition until the eleventh hour, after execution was set, they sacrified the normal discovery processes that would have been available to them at that level. Before this court they ultimately conceded that at this time they are still unable to make any proffer of evidence to support the allegation of failure to investigate and prepare. Under these circumstances the district court did not err in holding

that the writ had been abused and in failing to grant the relief sought.

The emergency application for a certificate of probable cause and for stay of execution is therefore DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8844

Alpha Otis O'Daniel
STEPHENS,

Petitioner,

versus

Ralph KEMP, Superintendent,
Georgia Diagnostic &
Classification Center,

Respondent.

Appeal from the United States District
Court
for the Middle District of Georgia

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

December 13, 1983

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DE-

NIED and the Court having been polled at

the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service, not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED. The Petition for a Stay is DENIED.

GODBOLD, Chief Judge, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges, dissenting:

We respectfully dissent from the failure of the court to rehear this case en banc. An equally divided court resulted in the denial of the en banc petition. The claim in this case -- that Georgia's death penalty statute is being applied in an arbitrary and discriminatory manner and that the evidence proffered is sufficient to raise a material issue of intentional race discrimi-

nation and is sufficient to require an evidentiary hearing -- is identical in all respects with the issue in Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983).[1] Rehearing en banc in Spencer has now been granted, ____ F.2d ____, 1583 (11th Cir. December, 1983), and the

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1 We disagree with the panel's conclusion that Spencer can be distinguished on the ground that Stephens' counsel made no proffer of evidence on this issue. The hearing was not an evidentiary hearing. Counsel for Stephens proffered evidence based on newly available studies, (referring by name to the Baldus Study relied on in Spencer), summarized briefly the conclusions of the studies indicating a racially disproportionate imposition of the death penalty in Georgia, and when pressed for specifics stated that there would be presented the same evidence presented in the August, 1983 case of McCleskey v. Zant, No. C81-2434A in the Northern District of Georgia, and that the evidence would be presented tomorrow if the court pleased. The McCleskey case is presently under consideration by the district court.

en banc court will hear oral argument in January, 1984. It is clear to us, beyond peradventure, that petitioner's claim presents a substantial question in this circuit.[2]

Nor can the record in this case support a finding of abuse of the writ of habeas corpus, under the principles established in Sanders v. United States, 373 U.S. 1, (1963). At the time of Stephens' first state and federal petitions, the then extant evidence and the then established law appeared to preclude this claim as a matter of law. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S.

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2 We do not understand the Supreme Court's very recent denial of an application for stay of execution in Sullivan v. Wainwright, ___ U.S. ___, No. A-409 (1983), to be a decision on the merits of this issue.

976, (1979); Smith v. Balkcom, 671 F.2d 858, modifying 660 F.2d 573 (5th Cir. 1982). It was only long after Stephens' previous habeas petitions, that the particularized statistical study became available, which the Spencer court held on September 30, 1983, was sufficient to require an evidentiary hearing on the merits of the discrimination claim. Under these circumstances and the present record, and especially in light of the fact that petitioner has not been afforded an evidentiary hearing on the abuse of the writ issue,[3] we respectful-

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3 The hearing held by the district court on November 15, 1983, was not an evidentiary hearing. The district court rejected, in conclusory fashion, petitioner's assertion that his claim was premised on newly discovered evidence, notwithstanding the Spencer panel's holding that the same crucial evidence was not previously available, thus precluding a finding of deliberate by-pass. Spencer, 715 F.2d at 1580.

ly submit that Sanders v. United States, supra, precludes a finding of abuse of the writ.

The Baldus Study is now available to Stephens who offers evidence reflecting discriminatory application of the death penalty in Georgia, which offer has to this point been refused. This refusal comes on the same day this court votes en banc in Spencer the question of whether a proffer of the Baldus Study requires an evidentiary hearing. That question may very well include consideration of the merits of the issue of discriminatory application of the death penalty and other related issues.

We hold no preconception that the writ should be granted, but we strongly believe that Stephens is entitled to a hearing on the question of whether he is abusing the writ and on the claim of

arbitrary and discriminatory application of the death penalty in Georgia.

For these reasons, we dissent from the denial of consideration of Stephens' application for rehearing en banc.

KRAVITCH, Circuit Judge, dissenting:

I respectfully dissent from denial of rehearing en banc. Since the panel opinion issued, this court has granted rehearing en banc in Spencer v. Zant, which involves an issue identical to one presented in this case. Further, the petition for rehearing raises a serious question concerning petitioner's opportunity to proffer evidence at the district court hearing, a factor crucial to the panel's holding.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

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Alpha Otis O'Daniel STEPHENS, Petitioner,	:	Civil Action No. 83-407-2-MAC
vs.	:	[Stamped
Ralph KEMP, Superintendent, Georgia Diagnostic & Classification Center, Respondent.	:	] [November 21, 1983]

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OWENS, District Judge:

Petitioner Alpha Otis O'Daniel Stephens, on January 21, 1975, was convicted of murder in the Superior Court of Bleckley County for the execution-style slaying of Roy Asbell and was sentenced to death. Both his conviction and his sentence were affirmed on direct appeal in Stephens v. State, 237 Ga.

259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 50 L.Ed.2d 599 (1976).

Following the denial of relief on direct appeal, petitioner filed a petition for writ of habeas corpus in the Superior Court of Tattnall County. That court afforded petitioner an evidentiary hearing on May 17, 1977, and later denied petitioner's application for relief on or about December 14, 1977. On appeal from the decision of the state habeas court, the Supreme Court of Georgia affirmed the denial of petitioner's application for habeas relief in Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 58 L.Ed.2d 667 (1978).

Following the denial of relief in state habeas proceedings, petitioner filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the United

States District Court on February 8, 1979. This court denied petitioner's application for habeas relief on May 11, 1979. On appeal to the United States Court of Appeals for the former Fifth Circuit, the decision of this court was reversed, insofar as it upheld the validity of petitioner's death sentence, in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified on rehearing, 648 F.2d 446 (5th Cir. 1981).

Respondent's application for a writ of certiorari to this United States Court of Appeals for the former Fifth Circuit was granted by the Supreme Court of the United States in Zant v. Stephens, 454 U.S. 814, 70 L.Ed.2d 82 (1981). The Supreme Court of the United States, after certifying a question to the Supreme Court of Georgia in Zant v. Stephens, 456 U.S. 410, 72 L.Ed.2d 222

(1982), and receiving that court's response in Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982), reversed the decision of the Fifth Circuit Court of Appeals and thereby expressly reinstated the death penalty as to petitioner in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983). On September 19, 1983, the Eleventh Circuit Court of Appeals, acting in obedience to the opinion of the Supreme Court, reinstated petitioner's sentence of death in Stephens v. Zant, No. 79-2407, affirming this court's denial of petitioner's application for habeas relief. On November 1, 1983, petitioner's execution date was reset by the Superior Court of Bleckley County for November 16, 1983.

Having unsuccessfully pursued his claims for relief on direct appeal, through state habeas, and through federal habeas, on November 7, 1983, petitioner filed yet another state habeas petition in the Superior Court of Butts County. In that successive petition, petitioner sought to raise the following claims never before asserted: (1) that his confession was elicited while he was under the influence of alcohol or drugs; (2) that his trial counsel rendered ineffective assistance; (3) that the trial court failed to give an Enmund charge; (4) that the traverse jury which convicted him was selected from an unconstitutionally composed venire; (5) that the trial court failed to order a competency hearing to determine if he was competent to stand trial; (6) that the capital sentencing statute in Georgia is arbitrarily applied; and (7) that there is no meaningful proportionality review by the Supreme Court of Georgia.

On November 10, 1983, the Superior Court of Butts County denied petitioner's application for habeas relief and for a stay of execution. On November 14, 1983, the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal but granted a ten-day stay of execution to allow time to seek further relief in this court.

Thereafter on November 15, 1983, petitioner filed this petition for a writ of habeas corpus. It is a second and successive petition in which petitioner seeks to assert the same grounds for habeas relief that he unsuccessfully raised in the Superior Court of Butts County and also seeks an order of this court staying his execution by the State of Georgia.

In order to afford petitioner a full and fair opportunity to argue these issues which were not raised in his initial state or federal habeas proceeding and to explain why this court should not dismiss the instant successive petition on the grounds that it constitutes an abuse of the writ, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, a hearing was held November 15, 1983, in Savannah, Georgia before this trial judge.[1] This hearing having been con-

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1 Petitioner's present counsel suggests that the September 19, 1983 opinion handed down by the Eleventh Circuit Court of Appeals leaves this court no alternative but to consider at least three of the claims that he asserts (i.e., whether the trial judge should have ordered a competency hearing, whether trial counsel rendered ineffective assistance, and whether petitioner's confession was knowing and voluntary) on the merits. This court disagrees.

(Footnote continued)

cluded, petitioner's case is now ripe for disposition.

Discussion

In Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L.Ed.2d 148 (1963), the Supreme Court of the United States recognized that traditional principles of res judicata have no application in habeas corpus proceedings. "'A person detained in custody might thus proceed from court to court until he obtained his liberty.'" Id. at 7, 83 S. Ct. at 1073, 10 L.Ed.2d at 156, quoting Cox v. Hakes, 15 A.C. 506, 527 (H.L.

(Footnote 1 continued from previous page)

> The Eleventh Circuit's opinion specifically directs this court to "take whatever action is appropriate" with respect to the claims raised. The Eleventh Circuit expressed no opinion as to whether this court should in fact consider these claims on the merits.

1890). A second or successive petition may be asserted even though new and different claims are raised or if claims previously raised but not adjudicated on the merits are reasserted. Id. at 17, 10 L.Ed.2d at 163. Nevertheless, it was expressly noted that a prisoner may not endlessly obtain repetitive federal review of his conviction and sentence:

> [F]ull consideration of the merits of the [successive] application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading. [(signal omitted)].
>
> To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that 'habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. . . .'

* * *

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay. Id. at 17-18, 10 L.Ed.2d at 162.

In response to Sanders, Congress promulgated Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent, the State of Georgia's penitentiary warden, has pled abuse of the writ. He argues that petitioner's current application constitutes piecemeal

litigation, the only purpose of which is to further delay his execution. Once the State pleads abuse of the writ, the burden shifts to petitioner to prove that he has not engaged in such conduct. Price v. Johnson, 334 U.S. 266, 292, 92 L.Ed. 1356, 1373 (1948).

Where the burden is upon petitioner to rebut a Rule 9(b) claim of abuse of the writ, he is entitled to a hearing at which he may attempt to explain and rebut the allegation. Potts v. Zant, 638 F.2d 727, 747 (5th Cir. 1981), cert. denied, 454 U.S. 877, 70 L.Ed.2d 187 (1981). Petitioner was afforded this opportunity at the November 15, 1983 hearing at which he offered the following excuses for his failure to assert his present claims in his prior habeas petition -- intervening change in the law, newly discovered statistical evi-

dence, and ineffective assistance of habeas counsel.

Enmund Claim --
Intervening Change in the Law

Petitioner first urges that the trial court violated his constitutional rights by failing to instruct the jury at the penalty phase of his trial that it could not impose the death sentence absent a clear finding that petitioner himself killed, attempted to kill, or intended to kill the victim. Petitioner asserts that his excuse for failing to raise this claim in his prior habeas petition was an intervening change in the law, i.e., Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982), after he commenced his first habeas petitions.

If Enmund were possibly applicable in the instant action, this court would not hesitate to find an excuse; never-

theless, in this court's best judgment Enmund cannot possibly apply to petitioner's case because as shown by petitioner's several confessions petitioner put the gun to the victim's head and pulled the trigger several times. Cf. Autry v. Estelle, 706 F.2d 1394 (5th Cir. 1983) (In Autry the Fifth Circuit had occasion to consider petitioner's contention that the evidence was insufficient to support the death sentence under Enmund. On the basis of his statements that he had "killed some people" and the fact that he had possessed the murder weapon, the court found that his death sentence was not violative of Enmund.)

As Enmund is not possibly applicable to petitioner's case, his claim that the trial court violated his constitutional rights by failing to give the

jury an Enmund charge constitutes an abuse of the writ and must be DISMISSED. Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts.

Challenges to the Georgia Capital Sentencing Statute

Petitioner asserts two challenges to Georgia's capital sentencing statute. He urges: (1) that his death sentence was imposed under a statutory scheme which resulted in the arbitrary and unequal imposition of capital punishment based upon the race of the defendant and the race of the victim; and (2) that Georgia's appellate procedures do not provide adequate review of the proportionality of death sentences. Petitioner asserts that his excuse for failing to raise these claims in his prior habe-

as petition is that they are based upon newly discovered statistical evidence.

As to these claims, it is the opinion of this trial judge that petitioner's excuse is insufficient to justify a consideration of them in this successive petition. The statistical evidence which petitioner desires to present to support his claims is not "newly discovered." Nothing prevented the compilation of this information prior to this late date. Accordingly, petitioner having no valid excuse for failing to raise these claims in his prior habeas petition, these claims constitute an abuse of the writ and must be DISMISSED.[2] Rule 9(b), Rules Govern-

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2 Had petitioner raised these challenges to Georgia's capital sentencing statute in his prior habeas petition, this court would not have hesitated to hold an evidentiary hearin to ascertain the relevant
(Footnote continued)

ing Section 2254 Cases in the United States District Courts. See, Smith v.

(Footnote 2 continued from previous page)
facts upon which he relies in support of his claims.

The court notes however that even if it were proper to consider the merits of petitioner's claims in this successive petition, at the November 16, 1983 hearing he was unable to present any facts in support of his claim. He chose instead to rely upon bare conclusions.

Additionally, the court notes that petitioner's quarrel with the Georgia capital sentencing statute flies in the face of the Supreme Court's opinion in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976). The individual case-by-case determination provided for in the Georgia statute and approved by the Supreme Court takes into consideration that no two defendants are exactly alike and that no two crimes are exactly alike. The individual determination provided for in the statute with regards to deciding those who receive life imprisonment and those who receive the death penalty is not subject to any meaningful analysis by any sterile statistical treatment of the type upon which petitioner seeks to rely. Indeed, it is the
(Footnote continued)

Kemp, 715 F.2d 1459, 1468-69 (11th Cir. 1983).

Remaining Claims

Petitioner's four remaining claims (i.e., that his confession was elicited while he was under the influence of alcohol or drugs, that his trial counsel rendered ineffective assistance, that the traverse jury which convicted him was selected from an unconstitutionally composed venire, and that the trial court failed to order a competency hearing to determine if he was competent to stand trial) will be grouped together because he asserts a single excuse for his failure to have raised these claims in his prior habeas petition -- the ineffectiveness of his first habeas counsel.

(Footnote 2 continued from previous page)
individualized concept that resulted in petitioner's death sentence being reinstated.

Guidelines for analyzing whether ineffectiveness of previous habeas counsel can constitute an excuse under Rule 9(b) have been established in the analogous context of "cause" for failure to comply with a contemporaneous objection rule. In Goodwin v. Balkcom, 684 F.2d 794, 809 n.17 (11th Cir. 1982), the court noted that a "hollow claim" or "bare allegation" of ineffective assistance of counsel does not constitute "cause," citing Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977), while a more substantiated allegation, including an inexcusable justification supplied by the alleged ineffective counsel, may entitle the petitioner to proceed. Goodwin, 684 F.2d at 809 n.17.

Counsel for petitioner concede that though they have been active in the case for some sixty days, they are not pre-

pared to offer any culpable admissions from petitioner's first habeas counsel, but instead seek yet another stay of execution in order to depose them for the first time in what this court can characterize only as a "fishing expedition."[3] Under Goodwin and Lumpkin, this court finds that petitioner's claim is only a "bare allegation" which, not constituting cause under Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149 (1976), similarly fails to constitute an excuse under Rule 9(b). Instead, petitioner's allegations are asserted in a

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3 Indeed petitioner's present, pro bono, volunteer habeas counsel, while steadfastly championing his rights before this court and urging that previous counsel have been ineffective, in fact have no significant experience whatsoever in the trial or appeal of criminal cases, much less the trial or appeal of capital cases.

"piecemeal" fashion, with the only purpose being to delay his execution. See, Sanders, 373 U.S. at 18, 10 L.Ed.2d at 163. Accordingly, petitioner's remaining claims constitute an abuse of the writ and must be DISMISSED.[4] Rule 9(b),

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4 The court must note that it is possible from a reading of petitioner's trial transcript and the record as a whole to determine the effectiveness of trial and habeas counsel, and the court in other cases has indeed done so. While the court is firmly convinced that petitioner's claim of ineffective assistance of counsel (trial and habeas) constitutes an abuse of the writ, if the transcript and record in fact showed ineffective assistance of counsel this court would not hesitate to so hold even in this successive petition. See, Young v. Zant, 506 F. Supp. 274, 278 (M.D. Ga. 1980), rev'd on other grounds, 677 F.2d 792 (11th Cir. 1982); Gaines v. Hopper, 430 F. Supp. 1173, 1179 (M.D. Ga. 1977), aff'd, 575 F.2d 1147 (5th Cir. 1978); Walker v. Hopper, C.A. No. 75-80-MAC (M.D. Ga. 1977); Dixon v. Hopper, 407 F. Supp. 58, 67-68 (M.D. Ga. 1976); Allen v. Hopper, C.A. No. 74-39-ATH (M.D. Ga. 1975); Wray v. Hopper, 377 F. Supp. 653,
(Footnote continued)

Rules Governing Section 2254 Cases in the United States District Courts.

Conclusion

For those reasons hereinbefore stated, the claims raised by petitioner in his successive petition under 28 U.S.C. § 2254 constitute an abuse of the writ under Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts, and are hereby DISMISSED in their entirety. Petitioner's applications for a stay of execution, an evidentiary hearing, discovery, and funds to retain experts are DENIED.

Furthermore, it being the considered opinion of this court that there is

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(Footnote 4 continued from previous page)
656-57 (M.D. Ga.), aff'd, 505 F.2d 733 (5th Cir. 1974); Lee v. Caldwell, C.A. No. 2785-MAC (M.D. Ga. 1973).

no possible merit to petitioner's present petition as would justify further consideration on appeal, petitioner's application for a certificate of probable cause to appeal is also DENIED.

SO ORDERED, this 21st day of November, 1983.

Wilbur D. Owens, Jr.
United States District Judge